IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 43 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE A.N.DIVECHA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? No

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

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MALEK MANUBHAI PIRKHAN

Versus

STATE OF GUJARAT

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Appearance:

Shri K.B.Anandjiwala, Advocate, for the Appellants - accused.

Shri S.T.Mehta, Additional Public Prosecutor, for the Respondent - State.

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CORAM : MR.JUSTICE A.N.DIVECHA

Date of decision: 05/10/96

ORAL JUDGEMENT

The judgment and order of conviction qua the appellants - accused passed by the learned Additional Sessions Judge of Banaskantha at Palanpur on 28th November 1994 in Sessions Case No.47 of 1993 is under challenge in this appeal under Section 374 of the Code of Criminal Procedure, 1973 (the Cr.PC for brief). By his impugned judgment and order, the learned trial Judge convicted appellants Nos.1 and 3 herein (original accused Nos.2 and 4 in the trial court) of the offence punishable under Section 304 Part II read with Section 34 of the Indian Penal Code, 1860 (the IPC for brief) and appellant No.2 herein (original accused No.3 in the trial court) of the offence punishable under Section 324 thereof. Appellants Nos. 1 and 3 herein have been sentenced by the learned Sessions Judge for the aforesaid offence to rigorous imprisonment for seven years and fine of Rs.5000 in default simple imprisonment for one year for each accused. So far as appellant No.2 herein is concerned, the learned trial Judge has released him on probation on surety of Rs.10000 and bound him for two years not to indulge in such criminal activities. The learned trial Judge has acquitted the appellants herein of the offences punishable under Sections 147, 148, 149, 302, 307, 324 and 504 of the IPC and Section 135 of the Bombay Police Act, 1951 (the BP Act for brief).

2. The facts giving rise to this appeal move in a narrow compass. The incident is stated to have occurred on the New Year day according to the Vikram calendar, that is, on 26th October 1992. It is the case of the prosecution that one Mehboobkhan Sahebkhan had a pan -galla in village Bamroli near Rabari Vas. Some theft had taken place in his pan- galla about a fortnight prior to occurrence of the incident giving rise to the present proceeding. He suspected involvement of one Ambha Pirkhan Malek (original accused No.5 in the trial court) and Ajamkhan Driyavkhan (original accused No.14 in the trial court). According to the prosecution, appellant No.1 herein was indulging in bursting of crackers on 26th October 1992 near or in front of the pan -galla of said Mehboobkhan Sahebkhan. The latter appears to have scolded the former on that account. Thereupon, appellant No.1 herein went away and brought with him his aides and allies and started beating said Mehboobkhan Sahebkhan. He thereupon shouted for help. On hearing his shouts, one Alikhan Hayatkhan together with Rahematkhan Sahebkhan and Ayubkhan Sahebkhan arrived on the scene. They tried

to intervene but in the process they were also beaten by appellant No.1 and his companions. According to the prosecution, certain other people on the side of said Mehboobkhan Sahebkhan also arrived on the scene. They included Sahebkhan Kalukhan and Waghaji Kalukhan. They also were beaten in their attempt to intervene in the matter. In the process, Ayubkhan Sahebkhan, Mehboobkhan Sahebkhan, Rahematkhan Sahebkhan, Asrafkhan Muradkhan, Sahebkhan Kalukhan and Waghaji Kalukhan sustained injuries. They were by turn carried in a handcart to the highway and to Radhanpur in one tempo known as Ram-Rahim Tempo for treatment. In the meantime, appellants Nos.1 and 3 herein and one Pirkhan Alukhan (original accused No.1 in the trial court) also sustained injuries. They went to the Police Station at Varahi at about 6.30 p.m. at a distance of about 12 kms. from village Bamroli. A complaint was lodged by Pirkhan Alukhan in the Police Station at Varahi with respect to the incident in question. Since appellants Nos. 1 and 3 and said Pirkhan Alukhan had sustained injuries, they were sent to the Primary Health Centre at Radhanpur for treatment with a police yadi. In the meantime, Mehboobkhan and other injured persons appear to have reached at the Primary Health Centre at Radhanpur at about 6.30 p.m. They were examined by Dr. Jivalani at Exh.55 on the record of the trial court. He found injuries on the persons of Ayubkhan Sahebkhan, Mehboobkhan Sahebkhan and Asrafkhan Muradkhan to be serious. He therefore referred them to the Civil Hospital at Ahmedabad. The other injured persons from that group were given treatment and were admitted as indoor patients. Appellants Nos.1 and 3 herein and Pirkhan Alukhan were also examined by Dr. Jivalani at Exh.55 at about 8.30 p.m. They were given some primary treatment and were discharged on that very day. According to the prosecution version, Dr. Jivalani found the case to be a medicolegal case. He is therefore stated to have reported the matter to the Police Station at Radhanpur. It is the case of the prosecution that thereafter Alikhan Hayatkhan went to the Police Station at Varahi and lodged his complaint of the incident at about 10.25 p.m. According to the prosecution case, the complaint lodged by Pirkhan Alukhan came to be registered as C.R. No.87 of 1992. Thereupon, the Police Sub Inspector of the Police Station at Varahi had gone to village Bamroli for investigation. The complaint given by Alikhan Hayatkhan was registered as Crime Register No.88 of 1992. That was also sent to the very same Police Sub Inspector for investigation. It appears to have reached him in the course of his investigation of the earlier case at Bamroli. In the meantime, the injured persons referred to the Civil Hospital at

Ahmedabad were carried to Ahmedabad and were taken to the Civil Hospital thereat. They reached there at about 11.25 p.m. One injured, named, Ayubkhan Sahebkhan, is stated to have succumbed to his injuries about two hours later at 1.45 a.m. on 27th October 1992. On completion of investigation, the necessary chargesheet was submitted in the court of the Judicial Magistrate (First Class) at Radhanpur on 2nd February 1993 charging the present appellants along with 12 more persons of the offences punishable under Sections 302, 324, 323, 504, 147, 148 and 149 of the IPC and Section 135 of the BP Act. It came to be registered as Criminal Case No.82 of 1993. Since certain offences were triable by the Court of Sessions, by his order passed on 22nd February 1993 under Section 209 of the Cr.PC, the learned trial Magistrate committed the case to the Sessions Court of Banaskantha at Palanpur. It came to be registered as Sessions Case No.47 of 1993. It appears to have been assigned to the learned Additional Sessions Judge at Palanpur for trial and disposal. The charge against the accused was framed on 21st June 1994 at Exh.7 on the record of the trial Court. No accused pleaded guilty to the charge. They were thereupon tried. After recording the prosecution evidence and after recording the further statement of each accused under Section 313 of the Cr.PC and after hearing arguments, by his judgment and order passed on 28th November 1994 in Sessions Case No.47 of 1993, the learned Additional Sessions Judge acquitted all the

accused except accused Nos.2, 3 and 4 (the appellants herein) of the charge levelled against them. So far as appellants Nos.1 and 3 herein (original accused Nos.2 and 4 in the trial court) are concerned, they were found guilty of the offence punishable under Section 304 Part II read with Section 34 of the IPC and they were therefore sentenced to rigorous imprisonment for seven years and fine of Rs.5000 in default simple imprisonment for one year for each accused. So far as appellant No.2 herein (original accused No.3 in the trial court) is concerned, the learned trial Judge found him guilty of the offence punishable under Section 324 of the IPC but instead of sentencing him he was released on probation on the surety of Rs.10000 and was bound for two years not to indulge in such criminal activities. That aggrieved accused Nos.2, 3 and 4. They have therefore invoked the appellate jurisdiction of the this Court by means of this appeal under Section 374 of the Cr.PC.

3. It may be mentioned that, against the judgment and order of the learned trial Judge acquitting the remaining accused of the charge levelled against them and

the appellants herein of the offences punishable under Sections 147, 148, 149, 302, 307, 324 and 504 of the IPC and Section 135 of the BP Act, the State Government preferred an appeal in this court under Section 378 of the Cr.PC. It came to be registered as Criminal Appeal No.880 of 1995. By the order passed by the Division Bench of this court on 2nd April 1996 in the aforesaid appeal, it came to be summarily dismissed. It appears

that the State Government felt that appellants Nos.1 and 3 herein were leniently dealt with by the learned trial Judge qua the sentence imposed on them for the offence punishable under Section 304 Part II of the IPC. It therefore preferred an appeal for enhancement in this court under section 377 of the Cr.PC. It came to be registered as Criminal Appeal No.879 of 1995. By the order passed by the Division Bench of this Court on 2nd April 1996 in the aforesaid appeal, it came to be summarily dismissed. It appears that the State Government was also aggrieved by the order granting probation to appellant No.2 herein with respect to his conviction of the offence punishable under Section 324 of the IPC. It approached this court by way of appeal under Section 11 of the Probation of Offenders Act, 1958 for questioning the correctness of the order of granting probation. It came to be registered as Criminal Appeal No.881 of 1995. By the order passed by the Division Bench of this court on 2nd April 1996 in the aforesaid appeal, it came to be summarily dismissed.

4. Both learned Advocate Shri Anandjiwala for the appellants and learned Additional Public Prosecutor Shri Mehta for the respondent - State have taken me through the evidence on record in support of their respective submissions. Learned Advocate Shri Anandjiwala for the appellants has submitted that the approach of the learned trial Judge in appreciating the evidence on record is not sustainable in law and it has vitiated his conclusions with respect to the finding of guilt qua the present appellants. It has been urged by learned Advocate Shri Anandjiwala for the appellants that it ought to have been held that the prosecution failed to bring the guilt home even to the present appellants beyond any reasonable doubt. As against this, learned Additional Public Prosecutor Shri Mehta for the respondent - State has submitted that the learned trial Judge has carefully scanned and scrutinized the evidence on record and has recorded the finding of guilt against the present appellants qua the respective offences of which they have been convicted and the impugned judgment and order of conviction and sentence calls for no interference by this

court in this appeal at the instance of the present appellants.

5. It transpires from the evidence on record that the origin of the incident giving rise to the present proceeding is shrouded in mystery. The motive behind assault on the group to which the complainant belongs by the group of the present appellants was stated to be involvement of original accused Nos.5 and 14 in the alleged theft from the pan -galla of Mehboobkhan Sahebkhan. It is the prosecution case that the aforesaid incident of theft occurred about a fortnight prior to the occurrence of the present incident. As rightly submitted by learned Additional Public Prosecutor Shri Mehta for the respondent - State, if the case is based on direct evidence, the motive behind the incident becomes irrelevant. However, since the prosecution has tried to bring on record the motive behind the incident in

question, it has become necessary to examine it. Prosecution witness No.15 at Exh.86 has stated that appellant No.1 herein was bursting crackers near or in front of the former's pan-galla as if to celebrate the theft in his pan- galla. If that be so, the necessary inference would be that animosity or hostility was present between the two groups. That was nobody's case at trial. If there were no past enmity and hostility between the two groups, it passes comprehension as to why appellant No.1 should burst crackers near or in front of the pan-galla of Mehboobkhan Sahebkhan on the new year day according to the Vikram calendar to celebrate the theft therein. It is a matter of common sense that an incident of theft calls for no celebration. Besides, appellant No.1 herein is a Muslim. It is everyone's common knowledge that Muslims ordinarily do not celebrate the religious festival of Diwali. Even if it is accepted that people in village Bamroli believed and lived in communal harmony, it is difficult to comprehend that appellant No.1 would indulge in bursting crackers near or in front of the pan-galla of Mehboobkhan Sahebkhan with a view to provoking him for no good reasons. It thus becomes clear that the motive behind the incident in question appears to be different from what has been brought on record by and on behalf of the prosecution at trial.

6. As rightly submitted by learned Advocate Shri Anandjiwala for the appellants, the place of the incident in question or what is popularly known as the scene of

offence is also not established by or on behalf of the

prosecution beyond reasonable doubt. If we go by the prosecution version, the incident is stated to have started from the place in front of the pan-galla of Mehboobkhan Sahebkhan and it practically reached its zenith near the primary school at a distance of about 200 ft. therefrom. The complainant examined as prosecution witness No.10 at Exh.51 has clearly stated in his evidence that the appellants herein were armed with deadly weapons. According to him, appellants Nos.1 and 3 herein were armed with a dharia each and appellant No.2 herein with an axe. According to the complainant, Mehboobkhan Sahebkhan was beaten by the appellants herein in front of his pan-galla with deadly weapons. It is the case of the complainant that, at that stage, Ayubkhan Sahebkhan, Rahematkhan Sahebkhan, Sahebkhan Kalukhan and the complainant reached on the scene and tried to intervene and, at that stage, Ayubkhan Sahebkhan (the deceased for convenience) received injuries at the hands of the present appellants by giving blows to him with the deadly weapons. The Medical Officer at Exh.15 found the injuries on the person of the deceased, Mehboobkhan Sahebkhan and Asrafkhan Muradkhan to be serious in nature. They had bleeding injuries. It needs no telling that injuries received by use of deadly weapons would result in bloodshedding. If the incident occurred in front of the pan-galla of Mehboobkhan Sahebkhan and if the deceased and Mehboobkhan Sahebkhan and Asrafkhan Muradkhan received bleeding injuries at the hands of the appellants herein by use of the deadly weapons in their

hands, it would be obvious that certain bloodstains, if not a pool of blood, would be found in front of or in the vicinity of the pan-galla. The panchnama of the scene of offence at Exh.26 records non-finding of any blood marks in front of or in the vicinity of the pan -galla in question. The panchnama at Exh.26 records finding of bloodstains near the primary school at a distance of about 200 ft. from the pan-galla. The ground for not finding blood in front of or in the vicinity of the pan-galla is explained in the panchnama itself by saying that a tar road was in front of the pan galla and, in view of pedestrian traffic of both people and cattle, bloodstains might not have been found thereat in the midst of cow-dungs.

7. At this stage, it would be quite proper to look at the map at Exh.79 prepared by the Circle Inspector, named, Karsanbhai Shyambhai Patel, prosecution witness No.13 at Exh.76 on the record of the trial court. It transpires therefrom that the tar road in front of the said pan- galla was leading to village Bamroli and the

road near the primary school and near the electric pole was also leading to the very same village. The road near the primary school and the electric pole does not appear to be a tar road. If we use our commonsense, bloodstains and marks would appear more prominently on a tar road than on a road full of dust and earth. Drops of blood, if fall on dust and earth, would not easily be visible as such blood-drops would be absorbed therein. In the case of a tar road, absorption of blood-drops would not be so

much and so soon. It therefore passes comprehension as to why bloodstains were not found in front of the pan -galla of Mehboobkhan Sahebkhan where the incident in question is stated to have started and beatings with deadly weapons were stated to have been received by the injured people belonging to the group of the complainant. In view of this evidence on record, the starting point of the scene of the incident in question is certainly shrouded in mystery. It is difficult to believe that the incident started near or in front of the pan-galla in question.

8. So far as the presence of the complainant at Exh.51 is concerned, the evidence as to at what time he arrived on the scene is not free from doubt. In his oral testimony at Exh.51, he has stated that he was in Rabari Vas and on hearing shouts from Mehboobkhan Sahebkhan he rushed to the spot at the very same time when Ayubkhan Sahebkhan and Rahematkhan Sahebkhan reached the spot to rescue the victim of the assault by the group of the appellants herein. It is the say of the complainant at Exh.51 that along with Ayubkhan Sahebkhan and Rahematkhan Sahebkhan he also tried to intervene and to rescue Mehboobkhan Sahebkhan from the assault in question. Surprisingly enough, Ayubkhan Sahebkhan and Rahematkhan Sahebkhan received injuries in an attempt to intervene and to rescue Mehboobkhan Sahebkhan whereas the complainant did not receive any injury whatsoever. It is not the case of the complainant that he had covered himself in such a manner that he would receive no injury

whatsoever even if he tried to intervene and to rescue the victim of the assault in question. It is not the case of the complainant that he could dodge thrashing from everyone in the process. In that view of the matter, his escaping any injury of whatever kind in the scuffle would leave anyone wondering as to how it could happen. The only possible explanation could be that he did not reach the scuffle when it started or it reached its zenith. Besides, contradictions from the evidence of injured witnesses Mehboobkhan Sahebkhan at Exh.86,

Rahematkhan Sahebkhan at Exh.87 and Asrafkhan Muradkhan at Exh.90 would also raise a doubt about his reaching the scene of offence near Mehboobkhan Sahebkhan's pan -galla soon after starting of the incident in question.

9. Apart from the aforesaid evidence on record, the prosecution does not appear to have taken care to explain certain material facts clearly emanating from the record. It is an admitted position on record that appellants Nos.1 and 3 herein and one Pirkhan Alukhan sustained injuries. They also through Pirkhan Alukhan lodged their complaint in the Police Station at Varahi at about 6.30 p.m. with respect to the incident in question. They were sent to the Primary Health Centre at Radhanpur for treatment with a police yadi. The prosecution has not tried to explain the injuries on their persons. It is the case of the complainant and witnesses on his side that they had no arms whatsoever with them. Not even a stick was found with them according to the case of the prosecution. In that case, the only inference could be that the injured persons on the side of the appellants herein received injuries at the hands of some invisible person or persons. That is again not the case of the prosecution that the complainant and his group were rescued by some invisible hands. The injuries found on the persons of the appellants have thus remained unexplained.

10. In this connection, a reference deserves to be made to the binding ruling of the Supreme Court in the case of LAKSHMI SINGH v. STATE OF BIHAR reported in AIR 1976 Supreme Court at page 2263. It has been held therein:

> "In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:
>
> (1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
>
> (2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

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The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one.

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There may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries."

11. Learned Additional Public Prosecutor Shri Mehta for the respondent- State has submitted that it was not necessary for the prosecution to explain injuries on the person of appellants Nos.1 and 3 herein and Pirkhan Alukhan (original accused No.1 in the trial court) in view of the aforesaid ruling of the Supreme Court as such injuries were minor and superficial. It cannot be gainsaid that non-explanation of minor and superficial injuries found on the person of the accused would not assume much importance. The question is whether or not injuries found on the persons of appellants Nos.1 and 3 herein and said Pirkhan Alukhan can be said to be minor and superficial. We have to look to the evidence on record for the purpose.

12. It is an admitted position on record that Dr.Jivalani at Exh. 55 had examined inter alia appellants Nos.1 and 3 herein and said Pirkhan Alukhan at about 8.30 p.m. on the day of the incident, that is, on

26th October 1992. Injuries found on their persons were recorded by him in his certificates. They are at Exh.70, 71 and 72. They are stated in his oral evidence at Exh.55. Injuries found on the person of appellant No.1 herein was cutting down of his left nostril. It was found to be a sharp cut. In fact, it would somewhat result in disfiguring of his face. The Medical Officer at Exh.55 has stated in his evidence that it was by a sharp cutting instrument and it could be healed within 8 to 10 days if no complications would arise. It may be

mentioned that he has not mentioned the size of the injury in the certificate and he has explained it to be through oversight. It would be difficult to brand such an injury to be minor and superficial.

13. At Exh.72 on the record of the trial court is the medical certificate with respect to appellant No.3 herein. He was found to have a contused lacerated wound on the left side of his forehead of 2 cms. x 1 1/2 cms. bone-deep. According to Dr.Jivalani at Exh.55, its healing would consume about 8 to 10 days in absence of any further complications. According to him, it was caused by some blunt and hard substance.

14. At this stage, it would be quite proper to look at the injury found on the person of one Sahebkhan Kalukhan, a person found injured in the incident in question belonging to the group of the present complainant. He was also examined by the very same Medical Officer at Exh.55. The medical certificate in his case is at Exh.62 on the record of the trial court. He also had contused lacerated wound on the right side of his occipital region of the size 2 cms. x 1 1/2 cms. muscle-deep. He was admitted as an indoor patient in the Primary Health Centre at Radhanpur as deposed to by Dr. Jivalani at Exh.55. If the injury found on his person was found to be somewhat serious requiring the patient to be admitted as an indoor patient consuming about 7 to 10 days in healing in absence of further complications, the injury found on the person of appellant No.3 as transpiring from the medical certificate at Exh.72 could be said to be very serious. And yet, the Medical Officer at Exh.55 did not choose to admit him as an indoor patient. In fact, the injury found on the person of appellant No.3 herein as transpiring from the medical certificate at Exh.72 was inter alia bone-deep whereas that found on the person of Sahebkhan Kalukhan as transpiring from the medical certificate at Exh.62 was only muscle-deep. It cannot be gainsaid that a wound bone-deep would be more serious than a similar wound

muscle-deep. In that view of the matter, it would be difficult to accept the submission urged before me by learned Additional Public Prosecutor Shri Mehta for the respondent - State that the injuries found on the persons of appellants Nos.1 and 3 were of minor and superficial nature requiring no explanation at trial.

15. The injury found on the person of Pirkhan Alukhan as transpiring from the medical certificate at Exh.71 could be said to be not very serious. He is stated to have suffered an incised wound in the nostril 1 1/2 cms. long. The doctor has certified it to be a superficial injury. Non-explanation of his injury would therefore not assume much importance. However, non-explanation of the injuries on the persons of appellants Nos.1 and 3 herein would certainly assume importance in view of the aforesaid binding ruling of the Supreme Court as they could not be said to be minor or superficial.

16. It transpires from the oral testimony of the Circle Inspector examined as prosecution witness No.13 at Exh.76 that there is a Government Dispensary in Varahi and also a Police Station therein. Original accused No.1 is reported to have lodged his complaint of the incident in question with the Police at Varahi at about 6.30 p.m. on 26th October 1992. It transpires from the material on record that several people carried the injured victims on the side of the complainant to the Primary Health Centre at Radhanpur. It transpires from the oral testimony of the Circle Inspector at Exh.76 that Varahi would be on the way to Radhanpur from village Bamroli. It is the prosecution case that the complainant at Exh.51 had received no injury whatsoever. The prosecution has however not explained why the complainant did not go to Varahi soon after the incident for lodging his complaint of the incident as was done by accused No.1 at about 6.30 p.m. on that very day. It does not transpire from the record that the complainant at Exh.51 was very closely related to any of the injured victims. It transpires from the material on record that he merely helped them carrying in handcarts to the highway for transporting them to Radhanpur for treatment at the Primary Health Centre thereat. No explanation whatsoever has been brought on record by or on behalf of the prosecution why he chose to give complaint as late as at about 10.25 p.m. on that day and that too in the Police Station at Varahi. Unexplained delay of nearly five hours in lodging the complaint of the incident would certainly assume importance.

17. The prosecution has also not explained why the

Medical Officer of the Primary Health Centre at Radhanpur was partial to the group belonging to the complainant as against appellants Nos.1 and 3 herein along with original accused No.1 qua their injuries. As pointed out hereinabove, the injury found on the person of appellant No.3 herein as transpiring from his medical certificate at Exh.72 on the record of the trial court was slightly more serious than that found on the person of Sahebkhan Kalukhan as transpiring from his medical certificate at Exh.62 on the record of the trial court. Surprisingly enough, injured Sahebkhan Kalukhan was admitted as an indoor patient but appellant No.3 herein was treated as an outdoor patient. This preferential treatment on the part of the Medical Officer at Exh.55 has not been explained in any manner by or on behalf of the prosecution.

18. The prosecution has not chosen to bring on record the case papers of certain injured victims of the incident, named, Ayubkhan Sahebkhan, Rahematkhan Sahebkhan and Asrafkhan Muradkhan, though their injuries were found to be more serious and they were referred to the Civil Hospital at Ahmedabad as transpiring from the oral testimony of the Medical Officer at Exh.55. So far as the other injured victims of the incident were concerned, their case papers are at Exhs. 63, 65, 73, 74 and 75. So far as the case papers at Exh.73 are concerned, they do not give much details of treatment except mentioning of dates. The accompaniment thereto is the temperature chart. It is completely blank. So is the case with the other two case papers at Exhs. 74 and 75. The prosecution has not chosen to explain why details of treatment are not mentioned in the case papers and why the temperature chart in each case was kept blank.

19. It transpires from the material on record that the Medical Officer of the Primary Health Centre at Radhanpur at Exh.55 referred three injured persons to the Civil Hospital at Ahmedabad. They were the deceased, Rahematkhan Sahebkhan and Asrafkhan Muradkhan. The prosecution has not brought on record as to how they were carried from Radhanpur to Ahmedabad. There is nothing on record to show or to suggest the mode of conveyance used for the purpose. The distance between Radhanpur and Ahmedabad is roughly 200 kms. As transpiring from the oral testimony of Dr. Jivalani at Exh.55, they were sent to Ahmedabad some time after 8.00 p.m. on that day. As transpiring from the police yadi at Exh.96, they reached Ahmedabad at about 11.25 p.m. on that very day. It would mean that the distance of about 200 kms. was

covered within three-and-half hours not to keep in mind the obstruction on account of vehicular traffic in the City of Ahmedabad after entering its municipal limits. No ordinary vehicle would ordinarily cover a distance of 200 kms. within three-and-half hours. Any way, this is not of much importance.

20. It transpires from the post mortem report with respect to the deceased at Exh.104 that the number of external injuries found on his person were five. The Medical Officer at Exh.55 found only two external injuries on the person of the deceased. Again, this discrepancy may not assume importance. What is important is as to in what condition the deceased was brought to the Civil Hospital at Ahmedabad. No case papers of his have been brought on record by or on behalf of the prosecution nor was any attempt made to examine the Medical Officer treating him in the Civil Hospital at Ahmedabad.

21. Dr. Jivalani at Exh.55 has clearly stated in his oral testimony that the deceased was fully conscious and was able to speak and to understand at the relevant time when brought to the Primary Health Centre at Radhanpur. His condition was found serious requiring reference to the Civil Hospital at Ahmedabad. The Medical Officer at Exh.55 is stated to have reported the matter to the Police Station at Radhanpur. Surprisingly enough, no attempt was made to record his dying declaration at Radhanpur or at Ahmedabad. The prosecution has not chosen to explain its omission in that regard. This would certainly assume importance.

22. The other two injured victims carried to Ahmedabad were stated to be Asrafkhan Muradkhan and Rahematkhan Sahebkhan. Their case papers with respect to their treatment in the Civil Hospital at Ahmedabad have not been brought on record by or on behalf of the prosecution. What was their condition at the time of their admission to Civil Hospital in Ahmedabad is anybody's guess.

23. It transpires from the evidence on record that the police recorded the statement of Asrafkhan Muradkhan around 30th October 1992 in the Civil Hospital at Ahmedabad. It again transpires from the evidence on record that, at that time, another injured witness Rahematkhan Sahebkhan was not available for recording his statement. The Investigating Officer in his oral testimony at Exh.96 has stated that Rahematkhan Sahebkhan was discharged from the Civil Hospital at Ahmedabad when

he went to record his statement along with the statement of Asrafkhan Muradkhan. Rahematkhan Sahebkhan in his oral testimony at Exh.87 has stated that he was in Civil Hospital till 10th November 1992. This discrepancy as to when injured witness Rahematkhan Sahebkhan was discharged from the Civil Hospital at Ahmedabad is not explained by or on behalf of the prosecution. The position in that regard could have been clarified by bringing on record the case papers with respect to their treatment in the Civil Hospital at Ahmedabad and by examining at trial the Medical Officer giving treatment to them. This omission on the part of the prosecution would certainly assume importance.

24. The Medical Officer of the Primary Health Centre at Radhanpur at Exh.55 has stated that the history of the incident was given by Rahematkhan Sahebkhan and Asrafkhan Muradkhan during the course of their examination by him. His further version is that those injured victims were semi-conscious. They would obviously not be in a position to speak out clearly about the history of the incident. Their semi-conscious state would contradict the version of the Medical Officer at Exh.55 that they gave the history of the incident to him. Again, as transpiring from his evidence at Exh.55, the deceased was in a conscious state of mind. The history of the incident could have been gathered from him with necessary, if not sufficient, details like the names of assailants. Why the necessary details of the history of the incident were not taken down or recorded by him is again anybody's guess. Such omission on his part would certainly assume importance in this case.

25. Lastly, as transpiring from the evidence of Dr. Jivalani at Exh.55, the Police Station at Radhanpur was informed of the incident. It is true that the incident occurred at village Bamroli within the jurisdiction of the Police Station at Varahi. It however transpires from the evidence of police witness Kalubhai Rajubhai Chauhan at Exh.93 that the Police Station at Radhanpur could have recorded the First Information Report numbering as '0'. Why the police personnel in the Police Station at Radhanpur did not choose to record the First Information Report is again not explained by or on behalf of the prosecution. It is not the case of the prosecution that Dr. Jivalani at Exh.55 had not reported the incident to the Police Station at Radhanpur.

26. The Police Sub Inspector of the Police Station at Varahi (Madhusudan N. Trivedi) examined as prosecution witness No.28 at Exh.96 also appears to have remained

partial to the complainant and his group so far as this case is concerned. It transpires from the material on record that accused No.1 lodged the complaint of the incident at 6.30 p.m. on that very day. The witness at Exh.96 went to village Bamroli to investigate into the incident in question. It was the case of accused No.1 in his complaint that Mehboobkhan Sahebkhan had broken the glass of the headlight of the truck belonging to accused No.1 parked near his house situated near the primary school. When he tried to scold the mischief maker, the latter called his aides and allies and beat accused No.1 at the relevant time resulting in lodging the complaint registered as Crime Register No.87 of 1992. In spite of this nature of the complaint, the witness at Exh.96 has not chosen to draw the panchnama of the scene of the alleged offence figuring in the complaint registered as Crime Register No.87 of 1992. This omission on his part is not explained. His partiality towards the group of the complainant in this case is very much eloquent on the record of this case.

27. The cumulative effect of the omissions and discrepancies found in the material on record would leave no room for doubt that the prosecution has not been able to bring the guilt home to any of the accused even to the present appellants beyond any reasonable doubt. The learned trial Judge was in error in convicting the present appellants of the offences of which they have been convicted.

27. In the result, this appeal is accepted. The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge of Banaskantha at Palanpur in Sessions Case No.47 of 1992 is quashed and set aside. The present appellants are also acquitted of the charge levelled against them. They are ordered to be released forthwith if no longer required in any other case. The fine, if paid, is ordered to be refunded.

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